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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

6 JUSTIN ODELL LANGFORD,

Case No. 3:19-cv-00594-MMD-WGC

7 Petitioner,

ORDER

8 v.

9 RENEE BAKER, *et al.*,

10 Respondents.

11 **I. SUMMARY**

12 This habeas matter is before the Court on Respondents' Second Motion to Dismiss  
13 (ECF No. 71). For the reasons discussed below, Respondents' motion is granted.

14 **II. BACKGROUND<sup>1</sup>**

15 Following a nine-day jury trial, Langford was found guilty of one count of lewdness  
16 with a child under the age of 14. (Exh. 47, ECF No. 38-8.) On May 17, 2016, the state  
17 court entered a judgment of conviction sentencing him to life with parole eligibility after a  
18 minimum of 10 years in prison. (Exh. 50, ECF No. 38-11.) Langford appealed and the  
19 Nevada Supreme Court affirmed the judgment of conviction. (Exh. 66, ECF No. 39-6.) In  
20 July 2017, Langford filed *pro se* motions to modify and/or correct sentence and for  
21 sentence reduction in July 2017. (Exh. 70, ECF No. 39-10.) The motions were denied.  
22 (Exh. 120, ECF No. 43-8.)

23 Langford filed a *pro se* state habeas petition seeking post-conviction relief, which  
24 the state district court denied. (Exh. 139, ECF No. 44-5.) Langford appealed and the  
25 Nevada Supreme Court affirmed the denial of relief. (Exh. 201, ECF No. 48-1.) ~~Prior~~  
26 ~~to~~Before the post-conviction appeal decision, Langford filed a second *pro se* state petition

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28 <sup>1</sup>This procedural history is derived from the exhibits located at ECF Nos. 32-49 on  
the Court's docket.

1 in November 2018. (Exh. 179, ECF Nos. 46-11, 47-1.) The state court denied the second  
 2 state petition as premature and held that the second state petition was procedurally  
 3 barred under NRS § 34.725(1) and NRS § 34.810(2) as untimely and successive finding  
 4 Langford failed to show good cause and prejudice or actual innocence to overcome the  
 5 procedural bars. (Exh. 198, ECF No. 47-20.) The Nevada Court of Appeals affirmed the  
 6 state court's judgment, finding that the second state petition was untimely and successive,  
 7 and Langford failed to demonstrate actual innocence to overcome the procedural bars.  
 8 (Exh. 219, ECF No. 49-6.)

9 On September 25, 2019, Langford initiated this federal proceeding by filing a *pro*  
 10 se petition alleging six grounds for relief with numerous subclaims. (ECF No. 1.)  
 11 Respondents filed their first motion to dismiss. (ECF No. 30.) The Court granted in part  
 12 determining that Ground 2(D1) will not be construed as a ground for relief, Grounds 2(K),  
 13 (Y), (T), (U), (Y), (Z), and (A1) are unexhausted, the second portion of Ground 2(W)  
 14 alleging that trial counsel failed to "request missing witness jury instruction" is  
 15 unexhausted, and Grounds 3 and 4 are dismissed with prejudice. (ECF No. 68.) The  
 16 Court also deferred a ruling on exhaustion and any procedural default of Grounds 2(B),  
 17 (C), (D), (F), (Q), (R), and (B1). (*Id.*)

18 Respondents now move to dismiss the Petition because Grounds 2(B), (C), (D),  
 19 (F), (Q), (R), and (B1) are procedurally defaulted.<sup>2</sup> Langford argues that the state district  
 20 court did not have jurisdiction to reach a decision on the merits, that records were not  
 21 provided to Langford and his previous counsel, and that the state district court refused to  
 22 acknowledge Langford's arguments. (ECF No. 72.)

### 23 **III. DISCUSSION**

24 Federal courts are barred from considering a state prisoner's habeas claim if the  
 25 state courts denied his claim based on an independent and adequate state procedural  
 26 rule. *See Edwards v. Carpenter*, 529 U.S. 446, 454-55 (2000). Nevada's one-year statute  
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28 <sup>2</sup>Grounds 1, 2(A), 2(E), 2(G), 2(H), 2(I), 2(J), 2(L), 2(M), 2(N), 2(O), 2(P), 2(S),  
 2(V), 2(X), 2(C1), 5, and 6 are not addressed by this motion.

1 of limitation<sup>3</sup> for post-conviction petitions and prohibition on second or successive post-  
2 conviction petitions are independent and adequate state procedural rules as applied in  
3 non-capital cases. See, e.g., *Williams v. Filson*, 908 F.3d 546, 580 (9th Cir. 2018); *Bargas*  
4 *v. Burns*, 179 F.3d 1207, 1211-14 (9th Cir. 1999). When a petitioner “procedurally  
5 defaults” a federal claim, judicial review is barred unless he can show either: (1) “cause  
6 for the default and actual prejudice as a result of the alleged violation of federal law,” or  
7 (2) “that failure to consider the claims will result in a fundamental miscarriage of justice.”  
8 *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); see also *McQuiggin v. Perkins*, 569  
9 U.S. 383, 386 (2013) (the miscarriage of justice exception ensures “that federal  
10 constitutional errors do not result in the incarceration of innocent persons”).

11 To demonstrate cause, the petitioner must show that some external and objective  
12 factor impeded his efforts to comply with the procedural rule. See *Maples v. Thomas*, 565  
13 U.S. 266, 280-81 (2012). Ignorance or inadvertence does not establish cause. *Murray v.*  
14 *Carrier*, 477 U.S. 478, 486-87 (1986). To show prejudice, a petitioner must prove not  
15 merely that the error created a possibility of prejudice, but that the error worked to his  
16 actual and substantial disadvantage, infecting the entire proceeding with constitutional  
17 error. See *Carrier*, 477 U.S. at 494; *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019).  
18 To demonstrate a fundamental miscarriage of justice, a petitioner must show that the  
19 constitutional error complained of probably resulted in the conviction of an actually  
20 innocent person. See *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). This is a  
21 narrow exception and it is reserved for extraordinary cases only. See *Sawyer v. Whitley*,  
22 505 U.S. 333, 340 (1992).

23 In Ground 2(B), Langford alleges counsel allowed the state court to use a coercive  
24 *Allen* charge. (ECF No. 5 at 5.) Ground 2(C) alleges counsel allowed the violation of Rule  
25 24(B) of Federal Rules of Criminal Procedure. (*Id.*) Ground 2(D) alleges counsel failed to  
26 notify the state court that a government agency suppressed evidence. (*Id.*) Ground 2(F)  
27 alleges counsel failed at the discovery process. (*Id.*) Ground 2(Q) alleges counsel did not  
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<sup>3</sup>NRS §§ 34.726, 34.810(2).

1 ensure the jury was properly sworn.<sup>7</sup> (*Id.* at 6.) Ground 2(R) alleges counsel allowed the  
2 case to proceed without a grand jury indictment. (*Id.*) Ground 2(B1) alleges cumulative  
3 errors by counsel. (*Id.*) Langford raised each of these claims in his second state petition.  
4 (Exh. 179, ECF No. 46-11 at 23-28, 32-35, 51-73.)

5 Langford's claims in Grounds 2(B), (C), (D), (F), (Q), (R), and (B1) are procedurally  
6 barred. Langford raised Grounds 2(B), (C), (D), (F), (R), and (B1) for the first time in state  
7 proceedings in his second state habeas petition. (Exh. 179; ECF No. 46-11.) Although  
8 Langford raised Ground 2(Q) in his first habeas appeal, the Nevada Supreme Court  
9 declined to consider it in the first instance. (Exh. 201; ECF No. 48-1.) Langford included  
10 Ground 2(Q) in his second state habeas petition. The state district court dismissed  
11 Langford's second state habeas petition as successive and procedurally barred under  
12 NRS § 34.725(1) and NRS § 34.810(2) finding Langford failed to show good cause and  
13 prejudice or actual innocence to overcome the procedural bars. (Exh. 196; ECF No. 47-  
14 18.)

15 The Nevada Court of Appeals' determination that Grounds 2(B), (C), (D), (F), (Q),  
16 (R), and (B1) are procedurally barred under NRS § 34.726(1) and NRS § 34.810(2) was  
17 an independent and adequate ground to affirm the denial of the claims in Langford's  
18 second state habeas petition. The burden thus falls on Langford to prove good cause for  
19 the default and actual prejudice. See NRS §§ 34.726(1), 34.810(3).

20 Langford argues that the state district court did not have jurisdiction to reach a  
21 decision on the merits because the Nevada Supreme Court had not issued a remittitur on  
22 the appeals. (ECF No. 72.) Langford further argues that records were not provided to  
23 Langford and his previous counsel, and that the state district court refused to  
24 acknowledge Langford's arguments. (*Id.*) The Court agrees with Respondents that  
25 Langford failed to establish good cause and prejudice to excuse his procedurally  
26 defaulted claims. (ECF No. 79.) Langford's argument that the state district court did not  
27 have jurisdiction to deny Langford's second state habeas petition lacks merit. See *Foster*  
28 *v. Dingwall*, 228 P.3d 453, 454-455 (Nev. 2010) (holding that timely notice of appeals

1 divests district court of jurisdiction except as to matters independent from the appealed  
2 order and the district court retains jurisdiction to deny requests for relief regarding matters  
3 that are not collateral to or independent from the appealed order while the appeal remains  
4 pending).

5 Further, Langford's arguments that parties kept records from him and that the state  
6 district court did not acknowledge his arguments similarly fail. *Pro se* pleadings are  
7 understandably given the benefit of liberal construction. See *Haines v. Kerner*, 404 U.S.  
8 519, 520-21 (1972). However, claims based on conclusory allegations are not sufficient  
9 basis to provide relief. See *Mayle v. Felix*, 545 U.S. 644, 655-56 (2005). Langford's  
10 arguments are not supported by a statement of specific facts that is sufficient to show  
11 cause and prejudice to overcome this procedural bar. Accordingly, the Court dismisses  
12 Grounds 2(B), (C), (D), (F), (Q), (R), and (B1) as procedurally barred from federal habeas  
13 review.

#### 14 **IV. OPTIONS ON A MIXED PETITION**

15 A federal court may not entertain a habeas petition unless the petitioner has  
16 exhausted all available and adequate state court remedies for all claims in the petition.  
17 See *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed petition" containing both  
18 exhausted and unexhausted claims is subject to dismissal. See *id.* In the instant case,  
19 the Court held that Grounds 2(K), (Y), (T), (U), (Y), (Z) and (A1) are unexhausted and the  
20 second portion of Ground 2(W) alleging that trial counsel failed to "request missing  
21 witness jury instruction" is unexhausted (ECF No. 68.) Because Langford's petition is  
22 mixed, he has three options:

- 23 1. File a motion to dismiss seeking partial dismissal of only the unexhausted  
24 claims;
- 25 2. File a motion to dismiss the entire petition without prejudice in order to return  
26 to state court to exhaust the unexhausted claims; and/or

- 1           3. File a motion for other appropriate relief, such as a motion for a stay an  
2           abeyance asking this Court to hold his exhausted claims in abeyance while he  
3           returns to state court to exhaust the unexhausted claims.

4       **V. CONCLUSION**

5           It is therefore ordered that Respondents' second partial motion to dismiss (ECF  
6       No. 71) is granted. Grounds 2(B), (C), (D), (F), (Q), (R), and (B1) are dismissed as  
7       procedurally barred.

8           It is further ordered that, within 30 days of the date of this order, Langford must  
9       either:

- 10           1. File a motion to dismiss seeking partial dismissal of only the unexhausted  
11           claims;  
12           2. File a motion to dismiss the entire petition without prejudice in order to return  
13           to state court to exhaust the unexhausted claim; and/or  
14           3. File a motion for other appropriate relief, such as a motion for a stay and  
15           abeyance asking this Court to hold his exhausted claims in abeyance while  
16           he returns to state court to exhaust the unexhausted claims.

17       Failure to timely comply with this order will result in the dismissal of Langford's mixed  
18       petition without further notice.

19           DATED THIS 13<sup>th</sup> Day of December 2021.

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22           MIRANDA M. DU  
23           CHIEF UNITED STATES DISTRICT JUDGE  
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